



**Ndatani Enterprises Company Ltd & another v Railways Housing Cooperative Society Ltd; Mahaga & 2 others (Interested Parties) (Environment & Land Case 224 of 2009) [2023] KEELC 509 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 509 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 224 OF 2009  
LN MBUGUA, J  
JANUARY 26, 2023**

**BETWEEN**

**NDATANI ENTERPRISES COMPANY LTD ..... 1<sup>ST</sup> PLAINTIFF**

**TAITA CONSULTANTS CO LTD ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**RAILWAYS HOUSING COOPERATIVE SOCIETY LTD ..... DEFENDANT**

**AND**

**FRANKLINE MAHAGA ..... INTERESTED PARTY**

**JOSEPH ODIPO ..... INTERESTED PARTY**

**ELIZABETH BERYL ACHIENG ..... INTERESTED PARTY**

**RULING**

1. Coming up for determination before me are five applications. The first 2 are dated 9<sup>th</sup> March 2021 and 28<sup>th</sup> March 2022, brought forth by the defendants, while the other 3 are dated 5<sup>th</sup> April 2022 (amended on 13<sup>th</sup> June 2022 and further amended on 17<sup>th</sup> June 2022), 16<sup>th</sup> May 2022 and 15<sup>th</sup> July 2022 brought forth by the proposed 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties respectively. The genesis of the said applications is a Consent Judgment entered into on 31<sup>st</sup> October 2017 between the plaintiffs and the defendants.
2. Flash back; There is no controversy that the plaintiffs are limited companies, while the defendant is a Co-operative Society. Vide a plaint filed on 23.7.2009 at Machakos High Court in case no.224 of 2009, the plaintiffs claimed to be the registered owners of land parcels numbers 2202 and 2217 situated in Kajiado, parcel 7340/90 in Embakasi and another parcel in Athi river Machakos no. 10426/11 of which these parcels were sub-divided into plots measuring “40 by 80”.



3. That in the years 2003-2004, the plaintiffs entered into agreements with the defendants where the former sold various plots to the latter. That the sale agreements were not fully honored and the plaintiffs sought orders inter-alia that the said agreements were repudiated by virtue of lapse of time and that only the bonafide fully paid purchasers were entitled to the various plots.
4. The defendants filed a statement of defence on 1.8.2009, admitting the existence of the sale agreements but proffered a counterclaim accusing the plaintiffs of failing to execute the transfer forms and register the plots in the names of the respective buyers. The defendants sought orders for plaintiffs to effect transfer of various plots as follows; 25 persons to get land in parcel 7340/90 in Embakasi phase 111, 162 persons to get land in parcel 7340/90 phase 1, 19 persons to get land in parcel Kajiado/Kaputei-North /2209,10 persons to get land in parcel 2217, and finally 77 persons to get land in 10426/11, giving a total of 293 claimants of the various plots.
5. Some individual claims over the various suit plots spilled into the court's arena, the same being Machakos High court cases nos. 352 of 2009 and 353 of 2009. I discern from the proceedings herein that the files were consolidated and transferred to the Environment and Land Court where the case no. 224 of 2009 was the lead filed.
6. The history of the dispute is aptly captured in a ruling delivered on 12.3.2010 by Isaac Lenaola J (as he then was) whereby an application for injunction dated 23.7.2009 filed by the plaintiffs was dismissed while the application for injunction dated 21.8.2009 filed by the defendants was allowed.

### **The consent Judgment**

7. After a hiatus of about 8 years in the court corridors, the parties eventually entered into a consent dated 31.10.2017 which was adopted as a judgment of the court on 7.11.2017 and the court ordered that " the three files be removed from the list of pending cases". At this juncture I find it necessary to reproduce the contents of the said Consent Judgment;

"That by consent, Plaintiffs and the Defendants agreed to compromise the matter and settle it on the following terms:

(A). L.R 7340/90 EMBAKASI

1. Payments

- i. That Ndatani Enterprises Company Limited received a total of Kshs.13,727,253/- (Kenya Shillings thirteen million, seven hundred twenty seven thousand two hundred fifty tree) from Railways Housing Cooperative Society Limited on account of LR. 7340/90 EMBAKASI which is equivalent to 187 Plots/parcels inclusive of payment made of Ksh.380,000/-
- ii. That Ndatani refunded Ms. Elizabeth Njeri Obuong Ksh.150,000/- occasioning plot recalculation from 187-to 185 numbers of parcels.

2. Plots Allocation

- i. That Ndatani Enterprises Ltd. Has agreed to avail 162 plots within the project which have no encumbrances to purchasers as per the list provided by Railways Housing Co-operative society Limited (as shown in Annexed A List No.1). That Ndatani Enterprises Company Limited has and is willing to suitably relocate 23 purchasers to an alternative parcel in Isinya Olepolos scheme as per



the list provided by Railways Housing Co-operative Society Limited (as shown in Annexed A List No. 2).

3. That Ms Ndatani Enterprises Company Limited/Taita Consultants Company Limited and Railways Housing Cooperative Society Limited will jointly undertake to relocate the 23 buyers.

(B) L.R. 10426/11 KINANIE

1. Payments
  - i. That Ndatani Enterprises Company Limited received a total of Kshs. 8,439,233/- (Kenya shillings eight million, four hundred thirty nine thousand two hundred thirty three) from Railways Housing Cooperative Society Limited. On account of LR. 10426/11 KINANIE which is to cater for 77 plots/parcels.
  - ii. That Ndatani Enterprises Company Limited accommodated 4 purchases by way of refund and thus reducing the number of plots due to Railways Housing Co-operative Society Limited to 73 plots.
2. Plots Allocation
  - i. That Ndatani Enterprises Company Limited has agreed to avail 62 plots with the project which have no encumbrances to purchasers as per the list provided by Railways Housing Co-operative Society Limited (as shown in Annexed B List No. 1)
  - ii. That Ndatani Enterprises Company Limited has and is willing to suitably relocate 11 purchasers to an alternative parcel in Isinya Olepolos Scheme as per the list provided by Railways Housing Co-operative Society Limited (as shown in Annexed B List No. 2)
3. That SAMUEL BOTO and IRENE NYANCHOKA GISEMBA who are Plaintiffs in ELC NO. 352/2009 and ELC No. 353/2009 respectively be and are hereby allocated plot numbers 100 and 101 in the parcel.

(C.) L.R.2209 & 2217 KITENGELA NEW VALLEY

1. payments:
  - i. That Ndatani Enterprises Company Limited received a total of Ksh. 7,258,923/- (Kenya shillings seven million, two hundred fifty eight thousand nine hundred twenty three) from Railways Housing Cooperative Society Limited on account of LR.2209 and LR 2217 Kitengela equivalent to 56 plots/parcels. Out of the 56 Plots on sale, 26 plots were successfully transferred to owners and a balance of 30 plots was left yet to be transferred to individual owners.
2. Plots Allocation  
That Ms Ndatani Enterprises Company Limited to avail 24 plots as per the list provided by Housing Co-Operative Society Limited (as shown in Annexed C List No. 1). That Ndatani Enterprises Company Limited to suitably relocate 6 purchases of the said schemes



to an alternative parcel in Isinya Olepolos scheme as per the list provided by Housing Co-Operative Society Limited (as shown in Annexed C List No. 2).

(D.) Completion documents and ground status

That it is agreed for the purposes of transfers; Ms

Ndatani Enterprises Company Limited shall sign all the completion documents and submit them to their Advocates M/S Kang'oli & Company Advocates for onward transmissions to Ms Albert Kamunde Company the Advocates for Railways Housing Cooperative Society Limited who will proceed to execute transfers to the rightful owners.

(E) THAT ELC 224 of 2009, ELC 352 of 2009 and ELC 353 of 2009 be and are hereby marked as settled. That each party to bear its own costs.

(F) That the cost of transfer of each plot shall be borne by respective transferee at a sum of Kshs. 120,000/= or as appropriate.

IN WITNESS this consent agreement has been duly executed by or on behalf of the parties hereto this 31<sup>st</sup> day of October the year 2017.”

### **Case Management**

8. When I embarked on writing the ruling in respect of the five because of being bundled up in voluminous physical documents over a lengthy period of time. It is therefore necessary that the physical file be properly organized so as to maintain the sanctity of the records and to promote efficiency. To this end, the physical file shall be contained in three volumes whereby the 1<sup>st</sup> volume shall contain all hard copy documents filed before the application of 9.3.2021, the 2<sup>nd</sup> Volume shall contain all hard copy documents filed from the application dated 9.3.2021, while Volume 3 shall contain only the hand written proceedings (notes) of the court. The latter file shall at all times be placed at the top to prevent any further damage of the record.
9. I have gone through the various applications. I find that for the defendant's application of 9.3.2021, they desire that the restraining orders of 15.3.2010 be effected, while in the application of 28.3.2022, they are essentially seeking restraining orders against the plaintiffs. In the circumstances, the court will deal with the two applications together.
10. As for the applications of the intended interested parties, I find that there is a common thread in the said applications whereby, they desire to be joined in these proceedings and to have the consent judgment set aside. In that regard, the court will deal with these applications together.

### **Applications**

#### **Applications Dated 9<sup>th</sup> March 2021 and 28.3.2023**

11. For the application of 9.3.2021, the defendants is seeking orders that the court be pleased “ to set aside the consent judgment entered on 31<sup>st</sup> October 2017 and replace the same with the order dated 15<sup>th</sup> March 2010 plus costs”.
12. The said application is premised on the grounds set out on the face of the application and the supporting affidavit of Francis K. Maweru who is the chairperson of the Defendants. The defendants aver that after the suit was filed, the plaintiffs filed an application dated 23.7.2009 seeking injunctive orders, while the defendants filed their own application dated 21.8.2009 equally seeking injunctive



- orders against the plaintiffs. That vide a Ruling delivered on 12.3.2010, plaintiff's application was dismissed, while the one of defendants was allowed. The order was then issued on 15.3.2010.
13. The defendants further contend that on the same date of 15<sup>th</sup> March 2010, they applied for a caveat with respect to LR Kitengela 2209 and 2217 as well as LR No. 10426/11 and this was publicized in the Daily Nation Newspaper. That despite the said caveat restraining the plaintiffs from in any way alienating the suit parcels, the plaintiffs transferred the suit plots to 3<sup>rd</sup> parties who ended up putting structures thereon.
  14. That the parties later proposed an out of court settlement to resolve the dispute resulting in the consent of 31<sup>st</sup> October 2017.
  15. The defendants also aver that the plaintiffs did not disclose crucial information relating to the suit properties to them prior to the recording of the consent; for instance, that for parcel Mavoko Municipality block 53/108 and 109 the same had been transferred to a 3<sup>rd</sup> party by the name Josephine Nzula Ngui who had in turn sold that land to one Lilian Moraa Nyamamba, while parcel Mavoko Municipality block 53/120 which had been allotted to Josephine Bonuke Nyamamba by the defendants had previously been transferred to a Dr. Ajoni Adede by the plaintiffs.
  16. For the application of 28.3.2022, the defendants is seeking orders of temporary injunction restraining the plaintiffs from any dealings in respect of parcels of land plot 118 of LR No. 7340/90 in Utawala (listed as plot No. 133 in the consent of 31.10.2017) belonging to Joseph Odipo pending the hearing and determination of the main suit. Further and in the alternative that there be an order of status quo prevailing as at 9<sup>th</sup> March 2022 regarding possession user and occupation of the aforementioned plot until further orders are given by the court.
  17. The defendants contend that the 1<sup>st</sup> plaintiff have issued eviction notices to Joseph Odipo to vacate the aforementioned plot yet the said Joseph Odipo had fully purchased the said plot. It is noted that this application is more or less similar to the one dated 16.5.2022 filed by the intended 2<sup>nd</sup> interested party, one Joseph Odipo.
  18. The two applications (dated 9.3.2021 and 28.3.2022) have been opposed by the plaintiffs through the two Replying affidavits of one Alexander Muema Muthengi both dated 22<sup>nd</sup> April 2022. The deponent identifies himself as a Director Cum share holder of the plaintiffs. He contends that the consent judgment was rendered following stringent and transparent steps with full disclosure of all material facts and that there is no evidence availed to show that the suit plots have been irregularly transferred after the decree.
  19. The plaintiffs state that for parcel Mavoko Municipality Block 53/108 and 109, both had been registered in the name of Josephine Nzula Ngui before institution of this suit and title deeds had been issued. That the defendants were well aware of this fact due to the site visitations and searches.
  20. Further, that in respect of Mavoko Municipality Block 53/120, the title has never been transferred to any other persons (including Dr. Ajoni Adede) as alleged and the title is still in the name of the 2<sup>nd</sup> plaintiff and is available for transfer upon the defendants fulfilling the terms of the decree.
  21. The plaintiffs contend that the concept judgment of 31<sup>st</sup> October 2017 is almost fully implemented thus the setting aside of the same shall affect majority of innocent purchasers who have already settled in their respective parcels of land as per the court order.
  22. In respect to prayer no. 2 in the application of 9.3.2021 (reinstatement of the orders of 12.3.2010), the plaintiffs contend that the same cannot stand as what was issued on 15<sup>th</sup> March 2010 were



interim orders which were extinguished and or lapsed upon the entering of the consent judgment and subsequent decree.

23. In respect of the claims advanced by the defendants in relation to plot no 118, the plaintiffs contend that the said plot was not part of what was given to the defendants and is not the same as plot no. 133, and that Joseph Odipo is not the rightful owner of that plot no 118.

#### **Determination of the applications of 9.3.2021 and 28.3.2022**

24. I have considered all the arguments raised herein as well as the rival submissions. The issues falling for determination are whether the Consent Judgment of 31.10.2017 should be set aside to be replaced by the order issued on 15<sup>th</sup> March 2010, and whether injunctive orders should be issued restraining the plaintiffs from interfering with plot 118.

25. In the Court of Appeal case of Flora N.Wasike vs. Destino Wamboko (1988] eKLR, it was held that;

“It is now settled law that a consent judgment or order has contractual effect and can only be set side on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out”.

26. Similarly in the Court of Appeal case of Kenya Commercial Bank Ltd v. Specialized Engineering Co. Ltd (1982) KLR cited in Paul Kiplangat Keter v John Koech [2021] eKLR, it was held that:

“A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or by an agreement contrary to the Policy of the Court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the Court to set aside an agreement.”

27. It is trite law that he who alleges bears the burden of prove, and in the case at hand, it behooves the defendants to demonstrate that the consent order should be set aside. The crux of defendant’s claim is to be found at Ground no. viii in their application dated 9.3.2021 to the effect that

“On the strength of the Order dated 15<sup>th</sup> March 2010, the Defendants further applied for a caveat with respect to L.R No. Kitengela/2209 and 2217 and L.R No. 10426/11. Despite there being in place registered caveat and a further court order restraining the Plaintiffs jointly and severally from selling, alienating, transferring or charging any of the plots therein, the Plaintiffs continually disregarded the same by transferring some plots to third parties who in turn put up structures therein.”

28. Considering that the injunctive orders and caveats were lodged 7 years (in 2010) before the entry of the consent of year 2017, then it was paramount for the defendants to avail tangible evidence to demonstrate how and when the suit parcels were alienated.

29. The defendants also accuse the plaintiffs of none disclosure of material facts as particularized in paragraph 27 and 28 of the supporting affidavit of Francis Maweru dated 9.3.2021 where it is averred that;

“.. in particular, through a letter dated 17<sup>th</sup> June 2019, the 1<sup>st</sup> Plaintiff advised that with respect to Mavoko Municipality Block 53/108 & 109 the same had been transferred to a third party by the name Josephine Nzula Ngui which had been subsequently sold to Lydia



Moraa Nyamamba through a misrepresentation of facts by the 1<sup>st</sup> Plaintiff, a fact that had not been disclosed prior to the Consent Order between the 1<sup>st</sup> Plaintiff and the Defendants.

Further, Mavoko Municipality Block 53/120 which had been allocated to Josephine Bonuke Nyamamba by the Defendants, had previously been transferred to Dr. Ajoni Adede by the 1<sup>st</sup> Plaintiff a fact that was not disclosed prior to the Consent Order”.

30. A perusal of the Consent reveals that save for the cases of Samuel Boto and Irene Nyanchoka, plaintiffs in cases no. 352 and 353 of 2009, where their individual plots were mentioned, the rest of the consent only captured the large parcels with particular mention of the number of plots to be given to the defendant’s members. To this end, it is the defendants who were availing the list of their members and their respective plots as aligned to a particular large parcel. They were also availing the list of the purchasers who were to be refunded monies or to be re-allocated plots elsewhere.
31. It is worthy to note that in the list of members availed by the defendants, they had captured the ground status of the various plots. The question is, why didn’t the defendants also capture the registration status of these plots by the time they were preparing the list.
32. What resonates from the contents of the consent is that the plaintiffs bore the obligation of availing and re-allocating a particular number of plots. The issue of assigning the plots to any particular individual save Samuel and Irene was not captured save that the defendants is the one who had the list of its members.
33. I find that the plaintiffs have given their explanation at paragraph 19 and 20 of the Supporting Affidavit of Alexander Muema dated 22.4.2022, where it is stated that for parcels MAVOKO MUNICIPALITY BLOCK 53/108 AND MAVOKO MUNICIPALITY BLOCK 53/109, both had been registered in the name of JOSEPHINE NZULA NGUI before institution of this suit and Title Deeds issued and that the Defendants was aware of this from the searches and site visits. The plaintiffs have availed the green cards in respect of the said plots to buttress their arguments. The plaintiffs also aver that parcel MAVOKO MUNICIPALITY BLOCK 53/120 has never been transferred to any other person(s) including DR. AJONI ADEDE as alleged and that the Title is still in the name of the 2<sup>nd</sup> Plaintiff. Equally the plaintiffs have availed the title to the said land to support their arguments.
34. A perusal of annexure “ AMM3” reveals that indeed the parcel Mavoko 53/108 and 109 were registered in the name of JOSEPHINE NZULA NGUI on 12.5.2009, that is before this suit was filed on 23,7.2009. As for parcel Mavoko 53/120, the plaintiffs have availed the title deed showing that the land was registered in the name of the 2<sup>nd</sup> plaintiff on 3.3.3010. The defendants have not availed any evidence to challenge that registration status.
35. From the foregoing analysis, I find that the defendants have not demonstrated that the plaintiffs unlawfully alienated the land or that any material facts were concealed from the defendants.
36. It is worthy to note that before the consent of year 2017, the defendants had ample time to wit 7 years to carry out due diligence in relation to both ground and registration status of the various plots. It is also pertinent to note that the members of the defendants are quite many, going by the list availed in the pleadings mentioned at the introductory part of this ruling. There is no evidence to suggest that there is an avalanche of discontentment amongst these other members. If anything, the consent judgment itself captured the fact that some plots had already successfully been transferred to purchasers (see reference to allocations in Kitengela New Valley at page 2 of the consent).
37. It is therefore most probable that the setting aside of the Consent Judgment would put into jeopardy the rights and interest of many other beneficiaries of the suit plots.



38. Another point for consideration relates to prayer no. 2 in the application dated 9.3.2021 where the defendants want the Consent Judgment to be replaced by the orders of 15.3.2010. The said orders are to be found at page 227 of defendant's application of 9.3.2021. The said orders state that the application for injunction by the plaintiffs was dismissed while that of the defendants was allowed. The plaintiffs were thereby restrained from "selling, transferring, wasting, fencing any of the blocks". As rightly set out by the plaintiffs in the affidavits of Alexander muema, the orders of injunction were extinguished or lapsed upon the entry of the consent Judgment of 31<sup>st</sup> October 2017.
39. In the case of Benl Development Limited v First Community Bank Limited [2021] eKLR, it was stated that;
- "An interim order of injunction is never a carte blanche licence for the borrower to suspend his obligations under the contract and sit back pretty leaving the lender writhing in pain."
40. This is certainly not a case of lender and borrower, but the aforementioned authority gives a sneak preview of what would befall the litigants herein if the consent orders were to be replaced with the injunctive orders of 15.3.2010. For starters, this would create a Gordian knot taking into account that a decade has gone by since the issuance of the orders. The issuance of such orders would certainly bring untold suffering to all and sundry in so far as the suit parcels are concerned. It is not lost to this court that the defendants have over the years been hell bent on maintaining this status quo instead of bringing the litigation to an end, that is why they have been filling applications right, left and center.
41. It is not tenable that a judgment can be substituted with an interlocutory order of injunction, since primarily, such orders of injunction are only issued during the subsistence of the suit and their lifespan comes to an end once a judgment is given.
42. Finally, I find that there was a hiatus of 4 years from the time the Consent Judgment was entered into, upto the time the defendants filed their applications. No plausible reasons have been advanced as to why it took them such a long period to come back to court to set aside the Consent Judgment. The defendants should be exploring ways of implementing the Consent Judgment instead of pushing all and sundry into the abyss.
43. As regards the application dated 28<sup>th</sup> March 2022, this court having pronounced itself to the effect that the Consent Judgment shall not be set aside, then no injunction orders can be issued as there is no suit pending. Thus the prayers sought for injunction are standing on nothing. That application is equally found to have no merits.
44. This is a case whereby the members of the defendants were purchasing their plots from the plaintiffs through the defendants. To this end, particular sums of money were paid to the plaintiffs in lump sums of which, the plaintiffs was to give the defendants or re-allocate particular number of plots. The modalities of allocation of the individual plots was certainly not a subject of contest in the pleadings, since at no point was the court invited to deliberate on the rights and interests of individual members (save cases of Samuel and Irene).
45. In the end, I find that both the applications of 9.3.2021 and 28.3.2022 brought forth by the defendants are not merited and are hereby dismissed with costs to the plaintiffs.

### **Applications of the Interested parties**

46. The application dated 5<sup>th</sup> April 2022 (amended on 13<sup>th</sup> June 2022 and finally on 17<sup>th</sup> June 2022) has been filed by the 1<sup>st</sup> Interested Party one Frankline Mahaga. He prays for orders that he be admitted



in these proceedings as an Interested Party, that there be an order of injunction directed against the 1<sup>st</sup> plaintiff from in any way dealing with plot No. 004 and 116 as subdivided from LR No. 7340/90, that the consent order dated 31<sup>st</sup> October 2017 be set aside so as to reopen the case as the consent was entered without his authority which purported to review the contract between him and the defendants. The 1<sup>st</sup> Interested Party avers that he never gave the defendants authority to enter into the contract. And that plot 004 had already been fraudulently transferred by the time of the consent, where as plot no. 116 was deliberately left out of the consent. Thus the 1<sup>st</sup> plaintiff should be ordered to immediately and unconditionally transfer the 2 plots to the 1<sup>st</sup> Interested Party, and if this is not complied with, then the Deputy Registrar of the court should execute the transfer document. That in the alternative, the court should order the plaintiffs to pay the 1<sup>st</sup> Interested Party the sum of Ksh. 7 million for each plot totaling to 14 million which is the market rate of the two plots.

47. The 1<sup>st</sup> Interested Party avers that the court had issued the order of status quo on 15<sup>th</sup> March 2010, but the plaintiffs went ahead to transfer plot 004 to its proxies.
48. The Application dated 16<sup>th</sup> May 2022 has been filed by the 2<sup>nd</sup> Interested Party one Joseph Odipo who is seeking orders that he be admitted as an Interested Party in this suit, that there be an order of stay of the consent dated 31<sup>st</sup> October 2017 and the suit be reopened and that there be an order of injunction directed against the 1<sup>st</sup> plaintiff from reallocating, disposing or in any way dealing with plot no. 118 as subdivided by LR No. 7340/90. Further the 2<sup>nd</sup> Interested Party is also praying for orders to be declared as the rightful owner of plot no. 118 having purchased the same from the 1<sup>st</sup> plaintiff through the defendants.
49. The 2<sup>nd</sup> Interested Party therefore prays for an order directing the 1<sup>st</sup> plaintiff to immediately and unconditionally transfer the said plot to him failure to which the Deputy Registrar of the court be ordered to execute the transfer document thereof. In the alternative, the 2<sup>nd</sup> Interested Party is seeking orders that the 1<sup>st</sup> plaintiff be ordered to refund to him a sum of ksh. 3.5 million being the current market value of the suit plot.
50. The 2<sup>nd</sup> Interested Party claims that the effect of the consent of 31<sup>st</sup> October 2017 was to reallocate to him plot no. 133 instead of 118 without his knowledge consent or approval. He avers that the 1<sup>st</sup> plaintiff was served with an eviction notice to surrender plot no. 118. Thus the alleged reallocation of plot 118 as well as the eviction notices are illegal and fraudulent and he stands to suffer loss and damage.
51. The Application dated 15<sup>th</sup> July 2022 has been filed by the 3<sup>rd</sup> Interested Party, one Elizabeth Beryl Achieng who is seeking orders to be admitted as an Interested Party in this suit on grounds that she purchased plot no. 7340/95 and 7340/96 which are both included in the suit property. She contends that she stands to be affected by the decision of the court when it is made since she has an identifiable stake in the matter. She contends that even though she is a beneficiary of the orders given on 7<sup>th</sup> November 2017 that she has an interest in plot no. 95 and 96, she has to date not been issued with land titles of the said plots in her favour.
52. The plaintiffs have opposed the three applications via the affidavits of Alexander Muema Muthengi, two of them dated 7.7.2022 and another one dated 2.8.2022. The plaintiffs contend that the issues being raised in respect of plots 004, 117 and 118 are resjudicata as they were raised in the main suit where their claim was presented by their duly authorized agent who is the defendants. Further that the said defendants has represented the interested parties even before the institution of the suit as far back as year 2003, hence they (interested parties) cannot run away from the acts of their agent, and that the interested parties have not disclosed the alleged non-disclosure of fraud or misrepresentation.



53. The plaintiffs have further averred that the judgment has been implemented at 85%, adding that injunctive orders cannot be given as the main suit has been disposed off.
54. Further, the plaintiffs contend that the setting aside of the judgment will jeopardize the majority of land owners who have peacefully settled and taken occupation of their respective parcels and that the issues raised by the Interested Parties are between the said applicants and the defendants, hence the plaintiffs should not be involved.

**Determination of the interested parties applications.**

55. I have considered all the arguments raised herein including the submissions proffered in respect of the three applications. This is a situation whereby the 3 intended interested parties are some of the persons who purchased the suit land through the defendants. The purchases commenced in year 2003 and save for the two claimants in suit No. 352 and 353 of 2009, the defendants have for all purposes been representing the other members/purchasers.
56. In the case of E.T.V Attorney General & Another [2012] eKLR it was stated that;
- “Compromises negotiated and agreed upon by the parties to litigation are favoured and encouraged by the courts and parties are bound to abide by them and since they have the force of law, no parties can discard them unilaterally”
57. Close to 20 years have gone by since the agreements were entered into between the plaintiffs and defendants for purchase of the various plots. It is rather late in the day for the interested parties to jump ship and claim that the defendants had no mandate to negotiate with the plaintiffs to arrive at the consent.
58. Secondly and as noted earlier on in this ruling, the contents of the Consent Judgment was in reference to the large blocks of land, of which the defendants were being given various plots for its members. It would have been a different situation if the dispute was that the defendants did not get 162 plots in block 7340/90 Embakasi, 62 plots in Kinaine Block, and 24 plot in Kitengela New Valley etc. The issue of individual plots is between the purchases and their agent. I am therefore in agreement with the averments of the plaintiffs that the interested parties are bound by the acts and or omissions of their sole agent, the defendants, hence their claims ought to be directed to the defendants.
59. All in all, I find that all the three applications dated 5.4.2022, 16.5.2022 and 15.7.2022 are not merited and are hereby dismissed with costs to the plaintiffs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF JANUARY, 2023 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:-**

Osoro and Luchevebeli holding brief for Kevin Omondi for the  
Plaintiffs

Warau for Defendants

Asule for 2<sup>nd</sup> Interested Party

Mola for 1<sup>st</sup> Intended Interested Party



Anka for 3<sup>rd</sup> Intended Interested Party

Court assistant: Eddel

